



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Antenna Products Corporation

File: B-228289

Date: January 19, 1988

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### DIGEST

1. Protester's argument that as the low, technically compliant offeror it is entitled to award is denied where solicitation provided for award to the offeror whose offer represented the combination of technical merit and price most favorable to the government, and agency reasonably concluded that another offer's technical superiority and lower technical risk warranted its higher cost.
2. Protest that questions raised by agency during discussions were inconsistent with technical requirements in the solicitation and were intended to discredit protester's proposal is dismissed as untimely where it was not raised until after the agency had announced the intended awardee. Solicitation improprieties which do not exist in the initial solicitation, but which later are incorporated during discussions, must be protested no later than the next closing date for receipt of proposals.
3. Protest that agency evaluation of protester's technical proposal was biased is denied where there is no evidence that agency evaluators were biased or that their alleged bias was translated into action that unfairly affected protester's competitive position.
4. Protest challenging evaluation scheme in solicitation is untimely when not filed before closing date for initial proposals.

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### DECISION

Antenna Products Corporation protests the proposed award of a contract to Technology for Communications International (TCI) under request for proposals (RFP) No. N00039-87-R-0327(Q), issued by the Department of the Navy's Space and

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Naval Warfare Systems Command for horizontal omnidirectional broadband antennas. Antenna Products argues that as the low, technically compliant offeror, it should have received the award, but that the Navy was biased against it and evaluated its proposal unfairly. We deny the protest in part and dismiss it in part.

The RFP requested proposals for the fabrication, assembly, testing, and delivery of 37 antennas with options for 47 more. The items here are high frequency transmitting antennas that the Navy intends to use for shore-to-ship communication. The solicitation explained that proposals would be evaluated on the basis of price, technical, and management criteria, with price weighing more heavily than technical or management, and technical weighing substantially more than management. The RFP provided for award to the offeror whose offer represented the combination of technical merit and price most favorable to the government, and advised that award might be made to other than the offeror proposing the lowest price.

Offerors were instructed that:

"The technical proposal evaluation will be based upon the degree to which the offeror demonstrates an understanding of the Government's requirements; the offeror's level of innovation and technical competence and the probability of meeting the Government's requirements, supported through appropriate plans, approaches, analyses, and results of previous tests performed on HOBA antennas of similar design or on a scale model of the proposed antenna."

The RFP further advised that the following subcriteria were to be used in descending order of importance in determining technical merit:

- a. Specification
- b. Degree of Technical Risk
- c. Statement of Work
- d. Technical Data (DD-1423)

Antenna Products and TCI submitted offers in response to the RFP. The Technical Evaluation Board (TEB) evaluated the technical and management proposals of both offerors, and forwarded its assessment of both proposals and a list of proposed clarifications for each offeror to the Contract Award Review Panel (CARP). The CARP applied the predetermined weights to the Technical and Management scores and scored and weighted the price proposals. Antenna Products received a total weighted score of 73.453; TCI's weighted

score was 82.945. The Source Selection Authority determined both offers to be in the competitive range and initiated discussions with both offerors.

After responses had been received from both offerors, the TEB reconvened to evaluate the revised proposals. Antenna Products' technical score increased significantly as a result of the clarifying information that it had furnished, while TCI's score remained virtually unchanged. The Navy then requested best and final offers (BAFOs).

TCI modified its technical proposal in response to the request for final offers, leading the TEB to reevaluate its proposal and lower its technical score to 34.403. TCI also decreased its proposed total price significantly in its final offer, to \$3,988,329 thereby increasing its score under that factor. TCI received a total weighted score of 87.3625 on its final offer; Antenna Products' final weighted score was 81.0263. The Navy concluded that although Antenna Products price of \$3,577,595 was lower, the combination of technical superiority (Antenna Products' technical score was 24.7763) and lower technical risk of TCI's proposal warranted the higher cost of awarding to TCI. The Navy then notified Antenna Products that TCI was the apparent successful offeror.

Antenna Products first contends that as the low, technically compliant offeror, it should receive the award. According to the protester, given the detail of the technical specification and the amount of information required of offerors to demonstrate technical understanding, all technically compliant offers must be basically equal, leaving price as the principal selection factor. We find this argument to be without merit.

The solicitation did not provide for award to the low, technically compliant offeror; rather, it provided for award to the offeror whose offer represented the combination of technical merit and price most favorable to the government. In a negotiated procurement, the agency is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. Jones & Company, Natural Resource Engineers, B-228971, Dec. 4, 1987, 87-2 CPD ¶ \_\_\_\_\_. The agency has the discretion to select a more highly rated technical proposal if, as in this case, it is consistent with the RFP's evaluation scheme. Haworth, Inc., B-215638.2, Oct. 24, 1984, 84-2 CPD ¶ 461.

With regard to the protester's assertion that all technically compliant offers must have been basically equal, the record shows that the TEB found significant differences

in the technical proposals of the two offerors. The agency reports that TCI's technical proposal received a higher score than Antenna Products' proposal because it contained more detailed design elements and antenna performance results. Antenna Products' proposal reflected a more limited understanding of the government's requirements and lacked demonstrated performance results, which led to a rating that reflected a lower likelihood of meeting the government's requirements.

Antenna Products also argues that the Navy evaluated its technical proposal unfairly. The protester alleges that the questions raised by the agency during discussions were intended to discredit its proposal and cast doubt on its technical competence, and that one question in particular requested information not required of offerors under the solicitation. These arguments are untimely.

Antenna Products is arguing, in essence, that the type of questions the Navy posed during discussions showed that the Navy either had added a technical requirement not included in the RFP or had adopted an interpretation of its technical requirements which was inconsistent with the specifications in the RFP. Under our Bid Protest Regulations, alleged solicitation improprieties that do not exist in the initial solicitation, but which later are incorporated during discussions, must be protested no later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1987); Microeconomic Applications, Inc., B-224560, Feb. 9, 1987, 87-1 CPD ¶ 137. Antenna Products was aware of the alleged inconsistencies between the RFP and the Navy's interpretation as soon as it received the Navy's questions, but it did not protest the alleged improprieties until after it was informed that the Navy intended to award to TCI. This issue is therefore untimely and will not be considered.

In any event, the record does not support Antenna Products' allegation that the agency sought to discredit its proposal by requesting clarification of various points during discussions. On the contrary, the protester's technical score rose appreciably after it responded to the agency's questions, indicating that the agency had pointed out deficiencies in the proposal for the purpose of permitting Antenna Products to revise its proposal rather than for the purpose of discrediting it.

Antenna Products further argues that the Navy was biased against it and intended from the outset to direct the award to TCI. The protester contends that the Navy canceled two prior solicitations for the same requirement in order to avoid awarding it a contract. The protester also alleges that a Navy contracting official threatened to retaliate

against it under this or other solicitations if it persisted in pursuing a claim under a prior contract.

The record does not support Antenna Products' allegations concerning the prior solicitations. The Navy reports that the first RFP was canceled before proposals had been evaluated because the using activity for which the antennas were being purchased had requested a change in the specifications. Under the second solicitation, a contract was awarded to TCI, but it was terminated for the convenience of the government after a protest by Antenna Products disclosed that the antenna proposed by TCI did not comply with a number of the RFP's specifications. (It was further determined that the specifications, as set forth in the RFP, did not adequately reflect the Navy's requirements, and the specifications were therefore revised prior to issuance of the current solicitation.) We see no evidence of a pattern of bias against Antenna Products in these events.

The protester also cites as evidence of the Navy's bias against it a statement allegedly made by the contracting officer in connection with a separate ongoing Antenna Products contract. The protester alleges that when the contracting officer learned that Antenna Products intended to file a claim under the contract for costs incurred as a result of government delays and changes in contract scope, he stated: "The government has a long memory and on any future solicitations will have to take into account that the claim has been filed and what that contractor might do in the future." The Navy disputes that this statement was made, and has submitted as evidence affidavits from the contracting official to whom the statement is attributed and another Navy official who was present at the time the statement was allegedly made. Both of these officials attest that they have no recollection of any such statement. The protester, on the other hand, has submitted excerpts from the diaries of two of its officers, both of which allude to the incident.

We need not resolve this factual dispute because even if we assume that the statement was made, that does not show that the evaluation of Antenna Products' proposal was biased. A protester alleging bias in an agency's evaluation of its proposal must offer proof not only that agency officials were biased against it, but also that this bias was translated into action that unfairly affected the protester's competitive position. We will not find an evaluation to be biased or arbitrary if the record indicates a reasonable basis for it. A.R.E. Manufacturing Co., Inc., B-224086.4, Apr. 15, 1987, 87-1 CPD ¶ 410. There is no evidence in this case that members of the technical evaluation board were aware of, or in any way influenced by, the statement

attributed to the contracting official. Furthermore, as discussed below, our review of the record indicates that their evaluation of Antenna Products' proposal was reasonable.

Since the evaluation of proposals is the function of the contracting agency, our Office's review of an allegedly improper evaluation is limited to a determination of whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. Delany, Siegel, Zorn & Assocs., B-224578.2, Feb. 10, 1987, 87-1 CPD ¶ 144. We will question the contracting agency's determination concerning the technical merit of a proposal only upon a clear showing of unreasonableness abuse of discretion, or violation of the procurement statutes or regulations. Lewis-Shane, CPA, B-221875, June 4, 1986, 86-1 CPD ¶ 522.

As previously noted, the RFP here advised offerors that the technical evaluation would be based on the degree to which offerors demonstrated an understanding of the government's requirements, their level of innovation and technical competence, and their probability of meeting the government's requirements. The evaluators found greater evidence of technical competence in TCI's proposal since TCI already had an antenna available and in use, while Antenna Products had only a model. The evaluators further found that Antenna Products' proposal demonstrated a more limited understanding of the government's requirements and lacked the test results required to evaluate its ability to meet the solicitation's antenna pattern requirements. We do not think that the evaluators' decision to award Antenna Products' technical proposal a lower score than TCI's was unreasonable given the differences between the two proposals and we therefore see no evidence that the evaluators were biased in their evaluation.

In its post-conference comments, the protester raises several additional grounds of protest. The protester first argues that the Navy accorded technical risk a disproportionately heavy weight and price a disproportionately light one in its evaluation of proposals. The record does not support this assertion: it indicates that the CARP converted the raw scores furnished by the technical evaluators into weighted scores by multiplying them by points assigned to the evaluation factors which properly corresponded to the relative weight of the factors as set out in the RFP.

Antenna Products also argues that it was improper for the technical evaluation panel to have rescored the technical proposals after receipt of the final offers. Although the Federal Acquisition Regulation (FAR) provides that a request

for BAFOs will not be issued until discussions have been completed, FAR, 48 C.F.R. § 15.611 (1986), this does not mean, as the protester suggests, that offerors are precluded from making any further revisions to their technical proposals in their final offers. The record in this case indicates that the technical proposals were rescored after final offers were received because TCI modified its technical proposal. The record further shows that this revision resulted in a reduction in TCI's score. Antenna Products, on the other hand, made no changes in its technical proposal and its score remained unchanged. There was nothing improper in the agency's action, and in any event the rescoring was in the protester's favor.

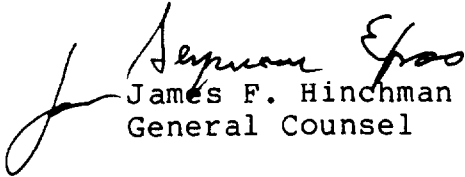
Another issue raised by Antenna Products in its post-conference comments is that the IFB and the CARP may have contained overlapping personnel, which would have permitted access to pricing information by the technical evaluators. We see nothing probative in the "evidence" cited by the protester to support its position. Contrary to the protester's contention, the fact that the CARP convened promptly upon receipt of the TEB's report is no indication that the two boards contained overlapping personnel. Further, we fail to see how the contracting officer's use of a phrase which also appears in the source selection plan-- "less than full understanding" of the RFP--in his letter requesting proposal clarifications from the protester in any way suggests that the CARP had prior knowledge of the TEB report.

Finally, the protester argues that as part of its effort to direct award to TCI, the Navy changed the weights assigned to price, technical and management criteria between the prior and the current solicitations. This ground of protest is untimely. The protester was on notice of the differences between the two RFPs from the date of its receipt of the current solicitation; any objection to the evaluation scheme in the current solicitation should thus have been protested prior to its initial closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

The protester claims that it is entitled to (1) its proposal preparation costs; (2) damages for lost profits and unabsorbed overhead, and (3) punitive damages. The protester's claims are denied. Our regulations permit the recovery of proposal preparation costs only where it is shown that an agency's action is contrary to law or regulation. 4 C.F.R. § 21.6(d); Target Financial Corp., B-226683, June 29, 1987, 87-1 CPD ¶ 641. This is not the case here. Further, our regulations do not permit the recovery of anticipated

profits even in the presence of wrongful action, nor do they provide for punitive damages. 4 C.F.R. § 21.6(d); Aero Technology Co., B-227374, Sept. 25, 1987, 87-2 CPD ¶ 301.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel